



Issue Date: 31 May 2013

In the Matter of
JOEL P. JORDAN, II,
Complainant

v.

Case Number 2009-STA-00062

IESI PA BLUE RIDGE LANDFILL CORP.,
Respondent

APPEARANCES:

Kimberly H. Ashbach, Esquire
For the Complainant

Bradley C. Mall, Esquire
For the Respondent

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER ON REMAND
DISMISSAL OF CLAIM

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination due to the employee's engagement in protected activity pertaining to commercial motor vehicle safety and health matters. After I had entered a Recommended Decision and Order dismissing the case, the claim was remanded to me by the Administrative Review Board ("ARB" or "Board"). At the time that I issued the Recommended Decision and Order the STAA's automatic review provisions governed review of such decisions. *See* 29 C.F.R. § 1978.109(a) (2010). The Department of Labor has since amended the STAA regulations. Under the amended regulations, parties must file a petition for review with the Board to obtain review a decision and order. 29 C.F.R. § 1978.110(a) (2012).

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities. 49 U.S.C.A. § 31105(a)(1). Complaints filed under the STAA are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that (s)he engaged in protected activity, that the employer took an adverse employment action, and that the protected activity was a contributing factor in the unfavorable personnel action.¹ Once the complainant has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

Although IESI discharged Jordan on November 20, 2007, I am advised that I did not apply the STAA burdens of proof in effect as of August 3, 2007, the date Congress amended the STAA to incorporate the burdens of proof contained in AIR 21.² I found that Jordan engaged in protected activity, and the Board summarily affirmed that finding.

I am advised that I made no clear finding as to whether Jordan's protected activity was or was not a "contributing factor" in his discharge.³ If Jordan proved that his protected activity was a contributing factor, I am required to determine if IESI proved by clear and convincing evidence that it would have discharged him absent his protected activity. The decision was ambiguous on this point as well because I discussed the "dual motive" analysis and explained that a complainant must prove pretext under such analysis. I am advised that under current law, this is incorrect. If protected activity was a contributing factor, then it becomes the respondent's burden to prove by clear and convincing evidence that it would have taken the same action without the protected activity.

I am mandated to expressly determine whether Jordan proved by a preponderance of the evidence that his protected activity was a contributing factor in IESI's decision to fire him. Only if Jordan meets his burden of proof, I should then determine whether IESI established by clear and convincing evidence that it would have discharged him absent his protected activity. If IESI meets this burden, then it will avoid liability under the STAA. If IESI does not, and providing that Jordan has established his protected activity as a contributing factor in his discharge, then the ALJ should consider appropriate remedies under the STAA. 49 U.S.C.A. § 31105(b)(3)(A).

CONTRIBUTING FACTOR

I again find that at all times Jordan was a company safety officer and was engaged in protected activity when he complained to his supervisors, the Pennsylvania State Police and the Federal Motor Carrier Safety Administration regarding commercial motor vehicle safety. When Jordan was terminated, his employer was aware of his protected activity and that there was a causal link between his protected activity and his discharge. This was established by more than an inference, but was established by a preponderance of the evidence to be "a contributing

¹ *Sacco v. Hamden Logistics, Inc.*, ARB No. 09-024, ALJ Nos. 2008-STA-043, -44; slip op. at 4 (ARB Dec. 18, 2009).

² This standard became effective under Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a).

³ "Within one paragraph of his decision, the ALJ found that the 'Complainant's termination was in some way related to his protected activity' and also referred to a 'causal link for a prima facie case' and an 'inference' of a causal link. Determining whether there was a prima facie case or an inference is not the same as determining whether Jordan ultimately proved that his protected activity was 'a contributing factor.'"

factor,” and therefore Complainant met his burden of proof. Jordan directs me to the Berkheimer factor,” which, alone or in connection with other factors, “tended to affect [in any way] the outcome of the decision” and therefore meets the contributing factor standard.

At this level of inquiry, Jordan need only show that he had a reasonable belief (objective and subjective) that he had reported a violation of law based on a preponderance of direct or circumstantial evidence. *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011) (an “internal complaint to superiors conveying [an employee’s] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA”)(citation omitted).

Jordan argues that Charles Blough, the Respondent’s regional safety manager, the primary decision maker in the termination process, makes clear that Jordan’s handling of the Berkheimer incident, which is the protected activity, is the primary reason for the termination. Complainant argues that his “self-serving statement” that it was not the fact of what Jordan was doing, but the manner in which Jordan “went about” his investigation is not worthy of belief.⁴

IESI argues that the evidence establishes that Jordan’s alleged protected activity was not a contributing factor to his termination. However, I accept that Jordan was a “safety man,” and in Blough’s absence, he was the one designated with the responsibility for safety concerning the drivers. No one at IESI disputes that Berkheimer hit the wall at Burger King. Jordan argues that only Berkheimer, whose job was on the line, continued to claim that it never happened, despite clear evidence otherwise.

After a review of all of the evidence, I again find that “the Berkheimer factor,” in which Jordan was acting as company safety officer, proves that the protected activity was a contributing factor in termination. Jordan does not have to prove that it was the only factor or a primary factor. I accept that it was a contributing factor.

SHIFTING BURDEN OF PROOF

As Jordan has proven that the protected activity was a contributing factor leading to discharge, IESI must establish by clear and convincing evidence that it would have discharged Jordan absent his protected activity. “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5, (ARB Jan. 31, 2011) (quoting

⁴ Complainant argues that “clearly” it was the whole Berkheimer event that caused the termination, due to the Company’s falsely articulated privacy concerns. There was no proof whatsoever that Jordan violated any privacy laws, and the sole competent testimony on the subject was Jordan’s statement that he never asked any medical information of Dr. Charlesworth, and never gathered any. Moreover, Jordan understood he could not violate any privacy laws, because only physicians are liable for giving out medical information in violation of HIPAA. Tr. 185. 330-31. Jordan testified that he told the doctor that “a physician does not have the discretion to exempt a driver for his ‘hearing, insulin usage, diabetes, [or] vision’” Tr. at 85. This comported with the DOT regulations. On the basis of this information given to him, Dr. Charlesworth sent a fax on Monday November 12, 2013 (not seen by Jordan until Tuesday morning), that revoked his certification and stating that he had been misinformed by Berkheimer. This action infuriated Berkheimer who began screaming about his alleged privacy rights, although none had been violated. Tr. 244-245.

Brune v. Horizon Air Indus., Inc., ARB No. 04-037, slip op. at 14); *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012)..

The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard. Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Company*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012).

IESI argues that clear and convincing evidence establishes that Jordan was removed for conduct, insubordination and failure to follow instructions. I am reminded that I already determined:

- Jordan’s supervisor “clearly explained” that he terminated Jordan because of his “repeated disappointment with [Jordan’s] decisions, failure to follow instructions, express statement that he would not consider anything but DOT regulations in fulfilling his job responsibilities, and most importantly, his insubordination.”
- IESI’s reasons for terminating Jordan were both credible and legitimate.
- “[Jordan] was not a model employee.”
- That there was “no discriminatory intent in [Jordan’s] termination.”
- “[Jordan] was terminated for legitimate, non-discriminatory reasons, namely his insubordination and failure to follow instruction.”

However, on remand, I must re-evaluate the evidence.

IESI maintains that Jordan was terminated for non-protected activities, including insubordination, repeated failure to follow his supervisor’s express instructions, placing IESI in jeopardy by violating IESI’s employee’s privacy rights and potentially violating other federal employment statutes, and his disrespectful, profane and inappropriate tone in communicating with his supervisor and other IESI management personnel.

Jordan argues that there is no clear and convincing evidence that he went beyond what he was authorized to do and moreover, it was the legal duty of the motor carrier to place the driver out of service, per regulations as interpreted by the FSMCA. It is alleged that at all times Ken Murdock, who was in charge of running the Respondent’s hauling division, was colluding with Mark Berkheimer, a driver, and possibly Blough, Jordan’s immediate supervisor, to keep secret Berkheimer’s alleged bogus medical card, reportedly secured through misrepresentation. Complainant represents that after Blough left an angry message to Jordan, he formed his opinion that Jordan should be terminated, acting on the hearsay information from others or in conspiring with others. Jordan alleges that he made his decision although he admitted that he didn’t have the pertinent documents, didn’t have the file, did not have access to the related information and only had “sketchy” information as to what had transpired. Jordan argues that there was no real investigation into what happened prior to his decision: “By this time he just viewed Jordan as a pain in the neck and a guy who was going to be scrupulous in carrying out safety, even at the risk of his own job.”

Jordan argues that as a final irony, “Berkheimer is still the gentleman holding a job at IESI, despite obtaining a false medical card and failing to report an accident, which behaviors both are terminable offenses.”

Although Jordan may be correct about the Berkheimer investigation, I find that IESI has proven that there were other reasons for termination. I am also not persuaded by Jordan’s conspiracy theory. During the hearing, recapping the day Jordan was terminated, the following exchange took place:

Q [Mr. Mall] Let me run through what I think happened, and you tell me if I'm wrong.

A [Jordan] Okay.

Q Mr. Blough called you and said, I'm at the landfill office, where are you?

A Okay.

Q And you said, I'm on my way, I'll be there shortly, correct?

A Okay, yes.

Q All right. An hour later, Mr. Blough calls you and says, Joel, where are you? And you tell him, I'm covering my ass, I'll be there shortly.

A Okay.

Q Half an hour later he calls you again.

A And I say --

Q And then he terminates you over the phone at that point in time?

A And I tell him I'll be there in 15 minutes, I got a trooper behind me.

Q A state trooper. At that point in time, he had waited an hour and a half for you -- I'm sorry, more than an hour and a half for you to show up?

...

Q Do you disagree with the fact that Mr. Blough waited for you for over an hour and a half when he told you that he wanted to meet with you on Monday?

A I won't disagree to that.

Q Okay.

A But if he drove three hours to see because he lived in Scranton, what's another 15 minutes?

Q Did he also not tell you that he had another appointment that afternoon?

A No, he did not.

Q He did not tell you that?

A No.

Q Did he tell you when he discharged you over the phone specifically the reasons for why he was discharging you?

A I put the company at risk, is what he told me.

Q Did he tell you that you failed to follow his directions --

A No.

Q -- and that was one of the reasons you were being terminated?

A The one that jumps out at me -- it's been two years -- it was I put the company at risk.

...

Q And that you failed to follow company procedure, do you recall that?

A Very possible.

Q And then he said you placed IESI in jeopardy by unilaterally contacting Mr. Berkheimer's doctors and making inquiries into Mr. Berkheimer's medical condition without authorization from Mr. Berkheimer or the company, told you that, didn't he?

TR. at 288-92.

Mr. Blough testified that he decided to terminate the Complainant because the Complainant did not follow instructions given on that Friday or on the following Monday when he left him a message. *Id.* at 470. Mr. Blough stated that he decided to terminate the Complainant while he was on vacation in Maine. *Id.* However, before terminating him, Mr. Blough decided to speak with his boss, Mr. Appuzzi, and Mr. LoVerde to make them aware of his reasons. *Id.* at 471.

Mr. Blough clarified that he decided to terminate the Complainant's employment due to a compilation of factors, which included "the altercation with the landfill manager, his actions with Stan Shoop, as well as his actions where he basically told [Mr. Blough] that he didn't care about other regs." *Id.* Mr. Shoop was sent by Jordan to be screened for drug and alcohol abuse as a result of an accident. Mr. Blough maintained that sending Mr. Shoop unilaterally, without permission, violated company policy.

Mr. Blough testified that Jordan was hired to fill a specially designed position that was created as a condition of the Respondent's renewal permit at the landfill. The renewal permit required that the Respondent take measures to ensure that traffic around the landfill was under control. The Respondent, therefore, hired the Complainant to be the traffic and safety coordinator to "help monitor the roadway from Interstate 81 to the landfill entrance." *Id.* at 489.

The Complainant asserted that his job description included "[m]onitor[ing] truck traffic and local access roads for speeding, stopping, school buses, and Act 90 compliance." *Id.* at 23. He was also responsible for "[c]omplete monthly employee observations and driver ride-along evaluations." *Id.* at 23-24. Jordan testified that when he was hired, Mr. Blough told him to do everything he could to keep the company safe. *Id.* at 33. Additionally, he said that he was responsible for maintaining and updating Occupational Safety and Health Administration ("OSHA") and Department of Transportation ("DOT") records, "a big part" of his job. *Id.* He stated that he also administered random drug tests. *Id.* at 27.

Instead, according to Mr. Blough, the Complainant did not have any supervisory authority. *Id.* at 492. He wanted the Complainant to report problems to him, because he was still new and did not know a lot of the policies and procedures. *Id.* at 493. Mr. Blough was actually the company safety officer.

Mr. Blough further stated that he expected his employees to contact him about whether a specific DOT regulation applied to a situation. *Id.* at 503. Mr. Blough stated that the Complainant did not call him before sending Mr. Shoop to have a drug and alcohol screening. *Id.* Mr. Blough confirmed that there is a separate IESI policy regarding drug and alcohol

screening, but stated that it does not require being tested simply because a truck is towed. *Id.* Mr. Blough stated that the Respondent follows the federal guidelines concerning sending drivers for drug and alcohol screenings. *Id.* Mr. Blough never heard of a “tow-and-go” policy. *Id.* at 504. He stated,

I told [the Complainant] that we could not do a drug test on Mr. Shoop, that it didn't meet the DOT requirements and that's what we followed, and that him sending a message by testing a driver is not appropriate, it wouldn't be fair to Mr. Shoop to be tested when we had other drivers in the company that had, I'm sure, similar incidents, non-DOT post-accident required accidents, to send Mr. Shoop and not others.

Id. at 505.

Accordingly, IESI presented “clear and convincing evidence” that it would have fired Jordan even absent his protected activity and therefore Jordan's STAA claims must fail regardless of whether Jordan established that his protected activity was a contributing factor in IESI's decision to terminate his employment.

"Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” *Warren v. Custom Organics, supra*).

When I rendered my decision in the Recommended Decision and Order, the burden of proof as to pretext and mixed motive was on Jordan and I found he did not meet his burden.

In evaluating whether Respondent has presented clear and convincing evidence, I find that IESI has proven that Jordan was insubordinate. Jordan admits that he may have put the company at risk. I credit Mr. Brough's testimony on this issue and additionally find that Jordan was admittedly surly with his superior, Mr. Blough. Despite instructions to meet with Mr. Blough, Jordan did not meet with him on the date of his termination. TR. at 288-92.

I further accept Mr. Blough's testimony that Jordan went beyond the authority in his job description. I accept that IESI employee's privacy rights might have been jeopardized, and that he was disrespectful and used an inappropriate tone in communicating with his supervisor and other IESI management personnel.

CONCLUSION

In summation, I find that although Jordan proved that his termination was in part due to protected activity, IESI proved by clear and convincing proof that the Complainant was insubordinate and assumed authority beyond his job description, and that it would have taken the same action without the protected activity

ORDER

It is hereby **ORDERED** that the claim is **DISMISSED**.

SO ORDERED

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).